A LETTER TO A DISSENTER,

Concerning the Neceſſity of

Frequent Parliaments

IN

ENGLAND,

For Correcting of

Erroneous Judgments

IN

WESTMINSTER-HALL.

Printed in the Year 1689.

A LETTER, &c.

SIR,

IN anſwer to yours of the firſt inſtant, I have conſidered a little of your Caſe, but can give no direct ſolution to your Doubt, by reaſon of the uncertainty of things: but yet for your defence in accepting the Commiſſion of the Peace in company with Papiſts, and acting therein without taking the Teſts, or performing the other requiſites injoyned by the 25. *Car.* 2. I do think that what I ſhall hereafter acquaint you with, may ſufficiently ſerve for your Juſtification, whenſoever any perſon ſhall pretend to arraign you for it in Company. It is well known, and for my own part I am very confident, that it was not inclinations to Popery, or a deſire of promoting Arbitrary Government, that induced you, and thouſands of other Proteſtants, to accept of Places upon that condition: beſides, you and your Party had for a long time been excluded from Offices, by the terms procured through the heats of the leſs moderate part of our Church: I mean in the Corporation Oath, which was intended on purpoſe for to throw you out of all concern in the Government. Nor was it to be wondered at that when an opportunity was offered (though not in ſo regular a method as might be deſired) for your admiſſion into Publick Employments, that you imbraced the ſame. In ſome places, I am ſure, it

muſt be agreed that you ſupplied the vacancies of ill Men, nor were your Adminiſtrations deſerving of complaint by any. In *London*, while your Friends ſat at the Helm, the Peace was as well preſerved, all Debauchery as much diſcouraged, and Juſtice as impartially Adminiſtred as in any place, or time, that I can mention: and we that live in this Town, do know there were as few (if any) complaints of the then Court of Aldermen, and fewer, than of their Predeceſſors. You had then an opportunity of being publickly good, and countenancing Vertue in general by your Authority; and can any Man ſay that was a thing not deſirable by good Men: ſo that in Honour or Juſtice no Man can blame or cenſure you; and if any do, it is of no great concern, for let them ſay their worſt, I do not queſtion but Religion, Vertue, Sobriety, Wiſdom and Honeſty, (of which, without a Complement, I can ſay you may deſervedly boaſt) will be encouraged under the Auſpicious Reigns of our preſent Sovereigns. I have heard ſome Men ſay that you firſt broke the Fence, and Bulwark, which our Law-makers had with great care and ſtudy erected and fixed, but they have forgot the commencement of that violation, which was apparently made in the voluntary ſurrender of Charters, which I am ſure you and your friends did always moſt zealouſly and juſtly oppoſe.

For your Defence, I will not pretend to juſtifie the Diſpenſing Power as agreeable to the Conſtitutions of the Realm, nor in truth can a Proteſtant conceive the exerciſe of ſuch a Prerogative to be allowable, or convenient in a Proteſtant Kingdom, whereof a Popiſh Prince is the Head. But yet, any Man that reads the Law muſt agree to me, that our Books do give ſome colour for ſuch a Doctrine, and much hath been

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ſaid for it in the Papers and Pamphlets of theſe laſt two years; nor does the little, little anſwer to Sir *Edward Herberts* Vindication, written by a friend of yours, repreſent it to the World any otherwiſe than as a doubtful Point, a queſtionable, diſputable Caſe.

I muſt confeſs that my Reading made it to me a thing of conſiderable difficulty, as for the Declarations in Parliament I am intirely ignorant of them, for that I could never attain to their knowledge by any publick Prints, and to procure Copies of Journals of both Houſes, in all times, was a charge too great for me to bear: and whether there were ſuch or no, I think it is an opinion not to be tolerated in a mixt Government, where the Legiſlature is lodged in the Crown and three Eſtates, that any one of them ſingly, ſhould have power to avoid what all have agreed on joyntly, upon the moſt mature debates.

That which you ought to inſiſt on, is the reſolution of the Judges in *Weſtminſter-Hall*, ſome of which all Men do own to be Gentlemen of Parts, Learning, and Probity, as *Luitwych*, *Herbert*, *Atkins*, and ſome few more. But were it otherwiſe, our Law Books tell us that the deciſions, and determinations of the Judges are Law, and that what is reſolved in *Weſtminſter-Hall*, by the majority there, is obliging, till reverſed, or otherwiſe declared by a ſuperior Authority; and that all inferior Magiſtrates are bound by the Opinions there delivered, as the Conſtitution of the Engliſh Nation now ſtands, this Aſſertion I ſhall endeavour to prove as clear as poſſible; I will not pretend that all my Arguments ſhall be directly concluſive, yet all of them ſhall conduce to illuſtrate the Point, nor will I pretend to alledge one moiety of what may be ſaid upon this Subject, but yet I hope enough ſhall be ſaid

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to give an undoubted ſatisfaction to every moderate impartial Reader, that thoſe who gave ſo much credit to the Judges Opinion, as to accept the Diſpenſation which they had reſolved to be valid, that ſuch men did not juſtly incur the Obloquy that hath of late been thrown upon them, as Enemies to the Laws, and Betrayers of the Proteſtant Religion: I ſhall firſt endeavour to ſhew, That

1. The Province and Office of the Judges is to interpret and expound the Laws of the Land.

2. The great Eſteem and Authority which our Law gives to ſuch their Reſolutions.

For the firſt, it is well known, that the Law of *England* conſiſts either of general or particular Cuſtoms and Acts of Parliament: the firſt we call the Common Law, being that which is, and ever was generally uſed throughout the Realm, ſuppoſed originally to commence by an univerſal voluntary Conſent. The ſecond are particular uſages in ſome particular places only, and of obligation only there, ſuppoſed to have the ſame original. The laſt are certain Rules and Orders *de novo*, made and agreed to by the common conſent of every Man in the Nation, either expreſs, or implyed in perſon, or by Rpreeſentatives: Of all theſe three the Judges are the common Expoſitors, and we have ordinarily no other Interpretation of them, their validity, their extent, or their meaning, but what proceeds *ex ore Judicum.* Of all the Courts of Juſtiee in the Realm thoſe in *Weſtminſter-Hall* are the ſuperior, and have the higheſt ordinary Juriſdiction, and their Authority is the greateſt of any, excepting the ſuſupreme Court of Parliament, from which there is no Appeal.

Now for the Common Law, that in all Doubts theſe

theſe Courts are Judges, we have many Maxims that prove it, as that *ad quæſtionem Judicis reſpondent Juratores, ad quæſtionem juris reſpondent Judices*, ſo ſaith 1 *Inſt.* 155. *In Forteſcue's Laus Legum Angliæ* in the Chancellor's ſuppoſed Diſcourſe to his Prince, he ſays, *Non expediet tibi propria ſenſus indagine legis ſacramenta mare, ſed relinquatur illa judicibus tuis, &c.* In the ſecond *Inſt.* 186. The King judgeth not by himſelf, but all his judicial power is diſtributed and lodged in his Courts. The Province of a Judge, though it be not *jus dare*, i. e. to make Laws, yet it is *jus dicere*, to interpret Laws. So ſaid King *James* the Firſt, in his Speech to his Judges in the Star-Chamber: and as one of our Engliſh Authors hath it, *Ad judicem ire, eſt ad jus ire:* An addreſs to the Judge is to the very Law it ſelf. Sir *Heneage Finch*, in his Syſtem of the Engliſh Laws, ſays in his Preface, that all points *unum aliquem ſortiuntur exitum vel per patriam vel per judices terminandum:* but I need not belabour this, it is in truth one of the Fundamentals of our Law, that on a Demurrer, or motion in Arreſt of Judgment, or on Writs of Error, or the like, if a queſtion be made in Law, the Judges are to determine the ſame; their very Style and Title in their Writs and Patents that conſtitute them to be ſuch, is *ad placita---terminanda:* and unto whom then ſhall the Lay Gentry and inferior Magiſtracy reſort for Direction, but to their Reſolutions, when in all Caſes that come before them, their Deciſion is fatal, and ends the Queſtion.

As to particular Cuſtoms, they are Judges of the Reaſonableneſs and Validity of them, and do every day damn thoſe which they conceive unreaſonable, and allow others; ſo is the firſt *Inſt.* 4. *rep.* and almoſt every Book of the Law; nay, they are Judges of the Rea-

ſonableneſs of the Fines impoſed on cuſtomary Tenants upon Alienations and Deaths, or other change of Lord or Tenant, but this concerns not your Caſe.

As to Acts of Parliament it is unqueſtionably the ſame; for he that runs may read it in our Law-Books, but that will appear evidently under the particular which I do moſt aim at for your ſatisfaction, and that is,

2. To ſhew the Eſteem and Authority which the Law gives to the Judges Reſolutions, and this I ſhall clear from ſeveral Topicks, as the preſumption in Law of their Learning and Honeſty, their Education, their Oath, the Injunctions on them to do right, and the puniſhments for doing otherwiſe, and ſeveral other Heads which I ſhall not here repeat, becauſe my time will not permit me to obſerve any method, but offer them to your conſideration as they do occur to my Memory.

In Sir *Thomas Smith*'s Commonwealth of *England*, which was always deemed of good authority, and is a judicious Deſcription of the Engliſh Government and Manners, it is there ſaid, that what the Judges pronounce to be Law, that is *held for right*, cap. 16. pag. 67.

In the Commentary on *Forteſcue's*, *Laus Legum*, pag. 564. they are ſaid to be *Leges loquentes*, and of ſo great ſway in this Nation, that they not only ſettle all Suits and Cauſes in their Courts and Circuits, but their Reſolutions are of high authority, not only inducements unto Parliamentary Declarations, as in the Statute *de bigamis*, 4. *Ed.* 1. but alſo in doubtful queſtions upon Laws, and the Interpretations of them, which appears in their being quoted every day as Law, and in the allowance of our Kings that their Reſolutions

Reſolutions are Law, *Lex*, ſays *Forteſcue*, *eſt regula regni quia regulat omnia in regno*, and the Judges pronounce it; my Lord *Coke* in *Præf.* to 6. *Rep.* tells us, that the Law is *proved* by the Judgments and Reſolutions of the Reverend Judges and Sages of the Common Laws in their judicial Proceedings, which they give upon their Oaths and Conſciences; and if that be the medium to prove the Laws of *England* by, you need no further excuſe for your action, than that you acted according to Law, until it was otherwiſe declared.

By ſeveral Acts of Parliament it is ordained, that no Queſtion of Law ſhould be before the Council, but before the Juſtices in their Courts, and the Courts of Juſtice are called the very Liberties of Engliſh Men, becauſe in them the Laws which make Men free are adminiſtred: 2. *Inſt.* 4. But unleſs their Authority be allowed to juſtifie you in this particular, they may rather be ſaid to be Snares, to ſay no worſe.

My Lord *Hobart* tells us in his *Rep.* 298. That the Determinations of the Kings Courts make a Point to be *de Lege*; as ſome Divines do ſay, that Articles are made *de fide* by the Determinations of the Church; and ſure I am all inferior Magiſtrates are bound to ſubmit to the former, as all the inferior Clergy muſt and do to the latter.

In 1. *Inſt.* 168. Their Reſolutions are called *Judicia quaſi juris dicta*, and ſo called becauſe ſo long as they ſtand in force *pro veritate accipiuntur*, and cannot be contradicted. In the ſame Book 39. A Judgment is called the very Voice of Right and Law; and theſe are Axioms againſt which no diſpute is to be admitted, 1. *Inſt.* 11. throughout all the firſt Inſtitutes, and almoſt in every other Book it is ſaid, the

Law is to be found in the Judicial Records, and that they are Law; now what are they but the Opinions of Judges entred upon Record in particular Caſes, having been judicially declared upon Oath.

The *Reſponſa Prudentium* in the Civil Law, were, and are of great authority, the Arreſts in *France* which are the ſame with our Reports, are of great authority, and my Lord *Coke* in his Preface to his 9. *Rep.* ſays, that the Opinions of the Judges are and ought to be of more authority than the Deciſions of the Civil Law Courts, for that it is one (amongſt many others) of the Honors of the Common Laws of *England*, that Caſes of great Difficulty are never adjudged or reſolved *in tenebris*, or *ſub ſilentio*, but in open Court; (and in ancient time moſt of our Courts in *England* were quite open in the Front, as ſome of them where the Judges ſit in their Circuits ſtill are, for the end that all men might reſort thither to learn and know that which is their Birthright, the Engliſh Laws) and there upon ſolemn and elaborate Argument at the Bar by the Council Learned of either Party, where the Record is opened, the Caſe debated, and Reaſons urged on both ſides, and afterwards is, or ought to be argued at the Bench by the Judges, where they deliver their Opinions *ſeriatim* upon certain days openly and purpoſely prefixed, declaring at large the Authorities, Reaſons and Cauſes of their Judgments and Reſolutions in every ſuch particular Caſe (*habet neſcio quid energiæ viva vox*) ſays he, and commends it for a reverend and honourable Proceeding in Law, a grateful ſatisfaction to the parties, and a great Inſtruction and Direction to the attentive and ſtudious Hearers, Thus far he; and what is all this for, but that Men may learn what the Law is.

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In *Plowden* 82. The Judges are called the Sages of the Law, who are exerciſed in the Studies of ſuch matters, and therefore appointed as the proper Interpreters of Common and Statute Law.

In 1. *Inſt.* 263. They are called the Sages of the Law, and are by all to be ſuppoſed *Juris periti*, and ſufficiently conuſant thereof, In 2. *Inſt.* 26. they are called *Juſticiarii*, and anciently they were named *Juſtitiæ*, becauſe preſumed and expected not only to be juſt in the Concrete, but in the Abſtract even juſtice it ſelf: *Glanvil. l.* 2. *c.* 6, and in common parlance we retain the expreſſion *Mr. Juſtice*; all which evinces, that the preſumption is and ought to be, that their Reſolutions are Law.

The very Forms in Entry of a Judgment are obſervable in this Caſe; *matura deliberaatione habita ideo conſideratum eſt quod*—— becauſe they are ſuppoſed to be given upon the greateſt deliberation and conſideration had of the matter, before them.

Conſider their Education as you will find it truly deſcribed in *Forteſcue*, and the Commentary upon him; Judges are choſen from amongſt the Serjeants, who are preſumed to be Grave, Sage Men, Read in the Laws, who generally are Educated in one of our Univerſities, and there continue till they have attained to ſome competent degree of knowledge in thoſe moſt ingenuous Sciences of Logick, Ethicks, Rhetorick, and Politicks, and having there learned the common Rudiments of that neceſſary Learning, as preparative for their intended Studies of the municipal Laws of their Native Country, and that being once accompliſhed, they remove to ſome of the Inns of Court, where they follow that Study, which is intended to be the Profeſſion of their whole Lives: and when they have ſpent ſeven years in ſuch Studies, and performed the

the Exerciſes required by the Orders of their reſpective Houſes, they are called to the Bar; after which they ſtill continue to perform Law Exerciſes, and follow their Studies, till after many years they arive to the degree of Benchers, in which they ſit and preſide upon Law Performances in their Houſes, till they have diſcharged the Office of Readers, out of which number only ought they to be called to the ſtate and degree of Serjeants at Law; and from amongſt theſe only are Judges choſen and conſtituted. Now after ſuch a progreſs in Learning, how can Judges be ſuppoſed, and preſumed, but to be good Lawyers; and if other Men cannot depend on ſuch Opinions, where ſhall we find a Rule, or Guide: for my part I know none, if this be not one.

In *Buſhels* Caſe, as reported by my Lord *Vaughan*, pag. 138. He admits it for a truth, that when the King hath Conſtituted any Man a Judge under him, his Ability, Parts, or fitneſs for his place, are not to be reflected on, cenſured, defamed, or vilified by any other perſon; and ſuch ſcandalous aſſertions, or injuries upon the Judges, are forbidden by the Statute of *Scandalum Magnatum* 2 *Ric.* 2. cap. 5. nor muſt we upon ſuppoſition only admit Judges to be deficient in their Office: and then it is certain that particular perſons, and inferior Magiſtrates, muſt not preſume to cenſure, or miſtruſt their determinations.

By our Law they are perſumed to be Impartial, as well as Learned Men. In all Suits, for the ſake of equal Juſtice, the Law allows of Challenges to Sheriffs, Coroners, Jurors, and other Officers, whereſoever there is a danger of unindifferency, by reaſon of inclination to one party, or enmity to another, but no Challenge was, or can be had to a Judge upon ſuch accounts. Further,

Further, To prove that we ought to admit, and ſuppoſe them Learned and Juſt, I would only deſire you to conſider, how that our Law excludes from being Judges, all ſuch as may be thought incapable of giving Right and True Judgments, as you may ſee in *Fleta*, lib. 1. cap. 17. *De Juſticiariis ſubſtituendis*, where they are ſaid to ſit *in ſede Judicandi quæ eſt quaſi thronus Dei*, and none is to be there that is *inſipiens, indoctus, contemptibilis vel ſeverus, niſi pro luco ponant tenebras, &c.* Now what can the deſign hereof be, but that they are ſuppoſed Guides to the People of *England* in the Laws of the Common Wealth. To the ſame effect may you read *Andrew Horne*, expreſſing himſelf, in his *Mirror of Juſtice*, cap. 2. ſect. 2. And if any of them do happen by their ignorant, or wilful miſtakes to miſguide the Realm, they are corrigible in Parliament: the ſeveral kinds of their Puniſhments are to be ſeen in the ſame *Mirror*, cap. 4. ſect. 18. the number of which is ſo great, that it would be tedious to relate them: and in truth I could never learn the reaſon why ſuch heavy Cenſures are by our Laws inflicted on corrupt and ignorant Judges, when they give an ill erroneous, or miſchievous Opinion in a particular Caſe, unleſs it be this, that their Reſolutions are governing to all Gentlemen, and other inferior Miniſters of Juſtice; and that their Doom is terrible, and Judgment ſevere, be pleaſed to read my Lord *Vaughan* pag. 139. 3 *Inſt.* 147. and 223. But ſtill their Reſolutions remain Sacred till ſo corrected, and the Law be declared to be otherwiſe by a ſuperior Authority. In the aforeſaid *Mirror*, cap. 5. ſect. 1. There are ſeveral abuſes in the Law rehearſed, ſome of which had been adjudged, and yet there is no queſtion made, but that while ſuch Judgments of Law, delivered and

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pronounced by the Kings Courts remain uncorrected, they were to be reputed for Law.

Add to this what is ſaid by my Lord *Coke* in his 2 *Inſt.* 103. Upon the Statute of *Marlebridge*, cap. 1. Whereby it is provided that all Men, great as well as ſmall, muſt have and receive Juſtice in the Kings Courts; he makes this concluſion from it, that all the Subjects of the Realm ought to ſubmit themſelves to the Kings Juſtices. In 2 *Inſt.* 360. *Judicia in curia regis reddita non adnihilentur, ſed ſtent in ſuo robore, &c.* And ſo great a regard is to be had to Judgments, that they are not to be avoided by pretence of a faint defence: beſides in Cauſes of difficulty (and ſuch was this, if any ſuch there be) they are ſuppoſed to conſult with other Learned Men in their Profeſſion, and therefore their Opinions are of the more Authority, 2 *Inſt.* 632. and in the ſame Book, pag. 399. upon *Weſt.* 2. cap. 20. Concerning the Tenants pleading in a Writ of *Mortd' Anceſtor*, my Lord *Coke* tells us that the admiſſion and allowance of a Plea by the Juſtices, ought to be holden for Law; and if ſo, what could any private Gentleman, or particular Lawyer think, when he heard the Judges of the Court of *Kings Bench*, by the advice of the reſt of the Judges, to Over Rule the Demurrer to Sir *Edward Hales*'s Plea.

Further, Read 2 *Inſt.* 419. on *Weſt.* 1. cap. 29. That the Juſtices of either Benches are preſumed to be Men of Integrity, Indifferency, Skill, Learning and Knowledge, and for that reaſon (as he ſays) excepted out of that Law, In the Earl of *Clarendons* Survey, *&c.* pag. 125. We have that Chancellors Opinion, that Judges are preſumed by Education to be fitted for the underſtanding of the Laws, and by their Oaths bound to judge according to right, and ſo muſt be the moſt competent

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to explain the difficulties of the Law, which no Soveraign as Soveraign can be preſumed to underſtand and comprehend (much leſs can any private man as ſuch be preſum'd to do ſo) and that the Judgments and Deciſions which thoſe Judges make, are the judgment of the Soveraign, and they are to pronounce their Sentence according to the Reaſon of the Law, and not the Reaſon (or Will) of the Soveraign; now would I willingly be informed who muſt judge when they do otherwiſe? Is it not the buſineſs of a Parliament to judge and correct them; and if ſo, ought not private perſons to be indempnified, if they follow, in the Intervals of Parliaments, the Opinions of thoſe whom we muſt not preſume to be ignorant or deficient.

In all the Speeches and Debates in Parliament, concerning the Male Adminiſtrations in *Weſtminſter-Hall*, 'twas always inſiſted and agreed, that the Judges Opinions were Influential and Governing of Inferiour Juſtices, as an aggravation of their Crimes; and this muſt be confeſſed by every man that hath Read the Proceedings in either Houſe on the buſineſs of Ship-money, or *Habeas Corpus*'s for relief againſt the then *fine cauſe* Impriſonments.

In *Hobart* 83, 84. 'tis held and agreed, that the Judges are the proper Expoſitors of the Common and Statute-Law; nor was it doubted or pretended that Statutes were to be expounded by any other than the Judges of the Land. 2 *Inſt.* 611. 614. and if it fall out that they do err in judgment, it

cannot otherwiſe be reformed, but judicially in a Superiour Court, or otherwiſe by Parliament. 2 *Inſt.* 618: My Lord *Coke* in his Preface to his third *Report*, tells us how the Kings of this Realm, *i. e. Edw.* 3. *Hen.* 4. *Hen.* 5. *Hen.* 6. *Edw.* 4. *Rich.* 3. and *Hen.* 7. did ſelect and appoint four Learned and Diſcreet Profeſſours of the Law to report the Judgments and Opinions of the Reverend Judges, as well for reſolving ſuch Doubts and Queſtions, wherein there was (as in all other Arts and Sciences there often happen) diverſity of Opinions, as alſo for the true and genuine ſenſe and conſtruction of ſuch Statutes and Acts of Parliament, as were from time to time made and Enacted, to the end that all the Judges and Juſtices in all the ſeveral parts of the Realm, might as it were with one mouth, in all mens Caſes, pronounce one and the ſame Sentence; and if this be, it is ſomewhat of an excuſe, when the greater do miſtake, if the leſſer happen to follow the ſame miſtake. In another Preface, *viz.* to the *4th. Rep.* the ſame Judge ſaith, that the Expounding of Laws doth ordinarily belong to the Reverend Judges, and Sages of the Law; And in another part of the ſame Preface, he calls his Reports the Determinations and Judgments of queſtionable and doubtful Caſes; which upon great Study, Conſideration, Conference, and Deliberation, have been reſolv'd and given by the Reverend Judges, and Fathers of the Law.

When the Law is clear, though it be unequitable and inconvenient, yet the Judges muſt determine as the Law is, without regarding the unequitableneſs or inconvenience; this is laid down as a Rule in *Dixon* and *Harriſon's* Caſe, *Vaughan* 37. and thoſe defects, if they happen in the Law, can only be remedied by Parliaments, *Ibid.* 38. and in *Craw*, and *Ramſeys* Caſe, *Ibid.* 285. the ſame rule, that Judges ought to judge according as the Law is, not as it ought to be; but if inconveniencies neceſſarily follow out of the Law, only the Parliament can cure them: my inference is this, that if ſo, then particular Magiſtrates whoſe Province is not to give Rules as the Judges is, but to follow; they are not concerned ſo very much with the point of conſequent inconveniencies, as they are to ſee that they do nothing but what *Weſtminſter-Hall* ſhall allow.

Beſides all this, conſider that by our Law, ignorance thereof will not excuſe an Offender, and I know no way an *Engliſh* Gentleman hath to attain its knowledge but from the Judges Reſolutions; for our Old Books of *Bracton*, *Britton*, &c. are able only to inſtruct in that which they treat of, which is not the twentieth part of the neceſſary knowledge; and all our other written Law are but the Reports of the Judgments of Courts; nay, for our very Statutes, ſome of which did Enact themſelves to be read in Churches, and Anciently were Proclaimed by the Sheriffs when ſent to them by

Writ for that purpoſe; but now, excepting that they are Printed, *which is no legal way of giving notice*, *the Country hath no publication made to them of our Laws*, *but by the ſolemn declarations of the Judges in their Charges*; and Occaſionally in the Tryal of Perſons or Cauſes as they do reſpectively happen before them; and you remember the Judge that in your Town publiſhed this Reſolution now in queſtion; now I leave the Inference to any man, if this be not a juſtification to a Country Juſtice.

Conſider further, that the Peers of the Realm do conſult with and follow the Opinions of the Judges, and do frequently abide by their Opinions in Cauſes before and concerning themſelves, and in Points of grand importance to them and their Poſterity, as they did in my Lord *Caſtlehaven*, Lord *Strafford*, Lord *Stafford's* Tryal, and ſeveral others; and throughout all Sir *Robert Cotton's* Abridgment of the Records in the *Tower*, as publiſhed by Mr. *Prynne*, you find them conſulted with in Parliament in the Times of *Rich.* 2. *Hen.* 4. and ever ſince: They are called as Aſſiſtants to the Lords Houſe, and in Queen *Elizabeth's* time Bills were referred to them joyntly with the Lords; though of later days it has been otherwiſe, and now they are only commanded by the Houſe to attend on the Committee, and then to give ſuch Advice as ſhall be required of them. *D'Ewes* Journal. 67. 71. 99. 527. and this was in the

the Fifth, Eighth, and Ninth years of her Reign, and ſo continued, ſays the Author, 'till the 39. *Eliz.* But ſtill (ſays he, *Ibid* 527.) they have Liberty in the Houſe it ſelf, upon leave given them by the Chancellour for the time being, to be covered; and they are there to deliver their Opinions, when askt; and though in that Houſe it be not concluſive, by reaſon of the Superiority and Greatneſs of that Aſſembly, yet it argues them to be of ſo great Reverence and Authority by the Cuſtom and Uſage of this Nation, which is the Law of it, that their Opinions may very well be ſuppoſed to be a ſufficient Warrant for the directing of the Actions of an Inferiour Magiſtrate, or other ſmall Officer, ſuch I take a Juſtice of the Peace to be, when named in the ſame Leaf with that moſt Auguſt Court of the Houſe of Lords. King *James* I. in his Speech 1626. repreſents them as petty Kings, when he ſays, remember Kings are properly Judges, and Judgment properly belong to them from God; and when Kings depute Judges to bear part of the ſubalterne Burthen of Government, they are taken into a near Conjunction with Kings, for the ſame Conjunction that is between God and the King upward, is between the King and the Judge downward.

Conſider the Protection which the Law gives to their Perſons and Judgments from all manner of contempt, obloquy, or other forceable injury; they are

are never to be charged with the Violation of their Oaths, and whoſoever is guilty of ſuch Scandal, is ſeverely puniſhable, 2 *Inſt.* 617. and many have ſuffered extreamly for cenſuring their Opinions, as *Jeffe* did for queſtioning the Law of their Opinion in the buſineſs of *Magdalen Colledge*, 1 *Cro.* 175. and *Harriſon* for blaming *Hutton*'s Opinion, 1 *Cro.* 504. *Hutt.* 131. and ſo did *William de Brewſe* in *Edw.* 1*ſt.* his time, for finding fault with *Roger de Hegham*'s judgment in a private Cauſe, when he was adjudged for it that he *diſcinctus in corpore, capite nudo, tena depoſita eat è banco Domini Regis ubi placita tenentur in aula* Weſt. *per medium aulæ prædict. cum curia plena fuerit, uſque ad ſcaccarium & ibidem veniam petat è præfato Rogero &c. Et poſtea committitur turri* Lond. *ibidem moraturus ad voluntatem Regis.* Mich. 33. & 34. Edw. 1. *coram Rege* rot. 75. cited 3. Inſt. 142. And many other Inſtances have we of the like kind both Ancient and Modern.

The whole Nation is concerned to juſtifie their Proceedings when juſt, as it appeared in the Caſe of *Henry de Braibrook* a Juſtice *Itinerant*, who was in the Reign of *Hen.* 3. ſurpriſed by one *Faleaſius*, againſt whom ſome Suits had paſſed, and by full conſent of Parliament, the King goes in Perſon with his People, both Laity and Clergy to beſiege the place where the Judge was detained, and did deliver him. *Rolls Abr.* 2. *Pt.* 97. all which

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ſhews that their Opinions and Proceedings are of high Authority in this Realm, and as no perſon can without Blame Cenſure or Arraign their Judgments, ſo no perſon ſurely can be blamed or cenſured that countenances or purſues their Judgments: The very place in which the Judges ſit, is by our Law more ſacred than the Place where the King's perſon reſides, and the Puniſhment is greater for an Affray committed in their preſence, than 'tis for one done in the Kings: If Blood be drawn in the Royal Palace, the Right hand of the Party is forfeit; but if a Blow be given, though no Blood drawn, or a Weapon drawn upon a Judge, though no Blow, ſitting the Court, 'tis forfeiture of the Right Hand of the Offender, 3 *Inſt.* 140. In caſe of a wrongful Commitment, or other injury done by a Judge of Record, no Action lies for a Party wrong'd, as *Bro. Abridg.* 9 *Hen.* 6. 60. *tit. Judges* 2. 9 *Edw.* 4.3. *edoem titulo* 10. and ſo was it held by the good Sir *Matthew Hales* in *Hamond* and *Howels Caſe. Mod. rep.* 119. 884. that Judges are not to be queſtion'd in private actions for what they doe in execution of their Office, and yet all men muſt agree that the Commitment by *Howel* was wrongful, his Opinion reſolv'd erroneous, and the Party impriſon'd ſuffer'd a notorious injury; ſo that a Man muſt ſuffer by their Errors, and yet not ſue, nor ſo much as complain; and ſhall a Man ſuffer when he complies with, and follows them? certainly the Law never intended ſo great an in-

juſtice

juſtice as that; and therefore there muſt needs be ſome relief in caſe of new Judges, giving other Opinions than the former, that thoſe who followed the firſt, may not be ruined by ſuch their eaſineſs.

Beſides, in preſumption of Law, every man muſt think that the Judges did right from the Oaths they take, and the Injunctions that are laid upon them to do ſo; by their Oath in *Dorſ. Clauſ de anno* 20. *Edw.* 3. *Par.* 1. they ſwear to do equal Juſtice and Execution of Right to all, and not to deny Right for the Kings Letter, or any other mans, and if in default, they ſwear themſelves to incur the hazard of the loſs of Body, Lands, and Goods; now what greater ſecurity can morally be had that their Reſolutions are Law, than that by Oath they are bound to it, and we know ſeveral Judges have refuſed to obey the King's Letter, as they did in Queen *Elizabeth's* time: 1 *Anderſon* 154. 158. by an infinite number of Statutes are they injoyned to obſerve their Oaths; how then can it be ſuppoſed that you ſhould ſuſpect their Opinions? But perhaps 'twill be ſaid, that there were different Opinions, and all of them were not of that ſentiment, to which you may anſwer that you could not be ſuppoſed to know that, and beſides that, you may tell him that objects it, that the Majority governs, and I'le put you in mind of an extraordinary Caſe for the purpoſe, and

and that is the Earl of *Shrewsbury's* Caſe, 1 *Bulſtr.* 11. upon a Writ of Error, there were divers Exceptions taken, and five Judges preſent, two were for affirming the Judgment in the whole, three were of opinion, that it ſhould be reverſed, but each for ſeveral reaſons, ſo that every Error, ſingled out by it ſelf, was over-ruled by three to two, and yet upon the whole there were three Judges to two for the reverſal, and accordingly the Judgment was reverſed, by Rule given by the Chief Juſtice, who was in opinion for to affirm it: but if their Opinions are divided equally, no judgment can be given; and ſo is Sir *Stephen Proctor's* Caſe, 12 *Rep.* 117. even in Parliament the majority concludes the whole, and the Speaker many times declares a Vote, delivers an Addreſs, or ſends a Meſſage, contrary to his own ſeparate opinion; 'tis the ſame thing in all Cities, Corporations, Companies, Boroughs, Towns, Pariſhes, or other Publick Aſſemblies: and in your Caſe you may aſſure your ſelf, the very Judges that were of another opinion, (if any ſuch there were) ſat and acted with thoſe that uſed the Diſpenſation, (after it was ſo ſetled) tried Cauſes by Juries impannelled, and returned by Sheriffs, under that capacity, and ſigned Warrants for the Execution of Malefactors directed to ſuch Sheriffs: ſo that this ought to be no objection deſerving of a thought for your diſcouragement, for it was then received and taken to be a ſetled Opinion.

There's none of your Enemies but would think themſelves ſufficiently juſtified in a particular Act relating to the Law, if they had the Opinions of the Attorney and Sollicitor-General for the time being, and ſeven or eight other Lawyers of repute and figure as of their ſide; what then can they juſtly charge upon you, who had as a further Warrant the Opinions of Judges delivered upon Oaths in a judicial method?

But ſome may upbraid you with the non execution of the Penal Laws, but forbearing it upon the publiſhing of the illegal Declaration, that which I would have you to anſwer them with is this, That their Opinions were general, and founded upon general Reaſons, as that *England* was an Imperial Kingdom; that the Kings of *England* were abſolute Soveraigns; that the Laws were the Kings Laws; that the King had a Power to diſpenſe with any of his Laws of Government, as he ſaw neceſſity; that he was ſole Judge of that neceſſity, and that no Act of Parliament could take away that Power; theſe and ſuch like were the Reſolutions: and ſurely theſe Opinions, ſo long as they remained in force, might very well warrant the Declaration for Liberty of Conſcience. Beſides, other Judges before them, had agreed a Diſpenſation good to a company which conſiſts of an indefinite number of men, increaſing and decreaſing every day in the week, as in *Thomas* and *Sorrel*'s Caſe, and that was a Priviledge to the particular perſons of that Corporation; Beſides, they have reſolved a General Pardon good by Proclamation, and all the Judges have three times allowed it ſo, and diſcharged Felons thereon; this they did in all Circuits. For my part, I cannot diſtinguiſh theſe Caſes, as to the point of generality, when they agree it good to one, why not to twenty, and at laſt indefinitely, eſpecially when they agree the ſame power Judge of the neceſſity and convenience, when, where, and unto whom? To ſpeak plain Engliſh, the diſtinction between a particular and a general Diſpenſation, is a diſtinction without a difference in the reaſon of things, and was only an Argument invented for the excuſe for ſome former ſtrains in the Law; for if you'l have my thoughts freely, I think that Sir *Robert Atkins*'s Learned, Elaborate,

borate, and Gentleman-like Diſcourſe, upon this Caſe, hath made it very plain, that 'tis unreaſonable, and againſt the plain Conſtitutions of the Realm, that when any Law is made for the publick good (as every Act of Parliament is ſuppoſed to be) by the conſent of the three Eſtates, that one ſingly ſhould have the power to repeal, annul, ſuſpend, or diſpenſe with it *pro tempore pro hac vice quoad omnes vel quoad hunc*, 'tis all one in effect; nay, when that all three Eſtates have agreed on a Law, and being aware and afraid of that old Popiſh Doctrine of *Non obſtante's*, have agreed to enact, that no *Non obſtante* ſhall be allowed thereto, that if ſuch be granted, it ſhall be void, and yet a *Non obſtante* ſuch a Law ſhall be allowed good; it is as much as to ſay, one of the three Powers ſhall have more authority ſingly and ſeparately than all three joyntly; no man of ſence but muſt confeſs them all to be forced conſtructions of the Law, (though of neceſſity to be ſubmitted to till declared otherwiſe by Parliament). Are not all Acts of Parliament deſigned for the common weal of the Kingdom, and if they differ in that reſpect, 'tis only in *magis & minus*, and not in ſpecie; and our Law-makers, who made a proviſion againſt an *Non obſtante*, did as much intend to provide againſt a Diſpenſation, as they that impoſed a Diſability, and I am ſure all the Arguments and Proofs in the Tryal of the ſeven Biſhops, concluded againſt all Diſpenſations whatſoever, againſt the allowance of ſuch a Power in general: but it may be ſaid, that 'tis neceſſary and convenient in ſome Caſes; and to that the anſwer is ready and eaſie, that 'tis fit the ſame legiſlative Power ſhould provide for ſuch Caſes, and then there will be the ſame authority in the original for the diſpenſing with, as there is for the making of

Laws, though it be exerciſed by another hand; and this ſeems agreeable to natural reaſon, for otherwiſe 'twill be idle to ſay, that the Legiſlature is in the Parliament only.

But to return to your defence, you have this further to offer, that if you had acted contrary to that Declaration, the *King's-bench*-Court might and undoubtedly would at that time have puniſhed you for ſo doing; how often have I ſeen Attachments granted againſt particular Juſtices and inferiour Magiſtrates, for acting according to their own Opinions on the conſtruction of ſome Statutes, (when perhaps in the right too) and ſo contradicting the Reſolutions of that Court on a Penal Statute? were not ſeveral Juſtices laid by the heels for ſo doing within theſe five years laſt paſt, but I will not name them, *&c.*

Beſides, I can aſſure you for your own caſe, a man is puniſhable that refuſes to take the Oath of a Juſtice, his Name being in a Commiſſion, and the Oath of Office tendred to him: It would not at that time have been an excuſe, that the other Oaths were not tendred with it: and there was great noiſe of proſecuting Informations for Offences of that kind in thoſe days; and have you not the love for publick Juſtice, an inclination to ſerve your Country, the want of a Magiſtrate in the Hamlet where you live, and the deſires of your Neighbourhood and Friends? have you not all theſe Conſiderations to alledge as ſufficiently inducive for an ordinary Gentleman to accept the Commiſſion with dependance upon the Judges Opinions in Law, though ſince evinced and declared to be erroneous; You have this to ſay, *Quod erravi cum patribus juris.*

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I ſhall only cite one Authority more, and that is *Bole* and *Horton*'s Caſe, in *Vaughan* 382. where 'tis agreed, that an Opinion, though erroneous, concluding to the Judgment of Record (and ſuch were thoſe in your Caſe) is a judicial Opinion, becauſe delivered under the ſanction of the Judges Oath upon deliberation, which aſſures us it is or was, when delivered, the opinion of the deliverer; and ſuch opinion of ſuch men (as I have before deſcribed Judges in common preſumption of Law to be) ought to to be thought of ſome authority, till another reverſe it, or declare it otherwiſe, I mean the Parliament; for 'tis ſeldom or never known, that any Court of Law doth or will give judgment contrary to the reſolution of all the Judges aſſembled for ſuch purpoſe, leſt it ſhould be thought raſh or unadviſed, as arguing too great a confidence of their own knowledge and probity, and the others ignorance or corruption, who were upon their Oaths and in the ſame Authority then, as their Succeſſors have afterwards: It's true, the thing is not impoſſible, and it happens too often, that one Court contradicts another, but yet they ſeldom or never undertake to overthrow a Caſe ſetled by the Judges, upon which Reſolution others do depend, for the moſt part they refuſe to hear any argument from the Bar, contrary to ſuch point ſo ſetled (as they uſually call it); ordinarily the Judges that were, or are of another opinion, will not admit it into a new debate; there is nothing more common than to hear the Court ſay, *that were it a new Caſe, they would never agree to it, but it having been once ſetled, they muſt maintain it*; and this hath been frequent, as in the Point of Limiting the Truſt of a Term ſetled by *Matthew Manning*'s Caſe; the Point of an Action of the Caſe againſt Executors on a ſimple Contract in *Slade*'s Caſe; the Point of charging

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an Executor with the Allegation of a Devaſtavit, &c. in *Cory* and *Thynne*'s Caſe; the Point of an *Indebitatus aſſumpſit*, for the Profits of an Office which deſtroyed the uſe of the ancient remedy by way of *Aſſize*, in *Howard* and *Wood*'s Caſe; the Point of *Quo Warranto's* againſt Corporations for the claiming to be Corporations, in the City of *London*'s Caſe, and multitudes of others which I could name; and the reaſon is good, for if ſetled Reſolutions ſhould be admitted into new debates, the Law would be an *individuum vagum & indeterminatum*, and as changeable as the times; and then *ſi incertam vocem tuba ſonat, quis parabit bello*; if the Law be ſo, who will know what is to be complied with; *humanum eſt errare*, and men will be men, to the end of the world; beſides, the conſequences will be miſchievous, every act done by Juſtices of Peace, Sheriffs, Deputy-Lieutenants, Officers of the Cuſtoms, Collectors of the Hearth money, Gagers of the Exciſe, and every other Officer that have complied with the above-mentioned Opinions will be void; all of them will be obnoxious to Actions of Treſpaſs in infinite numbers, beſides the Penalties of the Statute; the Sheriffs that executed men, will be deemed Felons as much as thoſe whom they hanged; Conſtables will be Treſpaſſers in all their execution of Warrants, &c. All Attainders by and before ſuch will be null, and many Civil Pleas may be vacated, with great numbers of ſuch other conſequences.

But this perhaps will affright you more than what I have ſaid can encourage or juſtifie; It is therefore to be hoped, that the Wiſdom of the Nation will be ſo happy as to find and make proviſion for the relief of what is paſt, according to the reaſon of our Laws, which ſay, that common repoſe requires an allowance or connivance at that which hath been ſo epidemical, and is of ſuch general

ral conſequence, and there's the ſame reaſon and rule in Policy too. From hence you may eaſily infer, the neceſſity of frequent Parliaments, even for the correction of Miſtakes in *Weſtminſter hall*, by declaring what ſhall be Law for the future, and that whenſoever a Doubt ariſes there, which is of difficulty and conſequence, the Judges may reſort thither for direction, and not run the Nation into diſorder by their Reſolutions, which are not only deciſory in the particular Caſe before them, but of ſuch general influence as I have ſhewn you. I hope you'l correct my Errors in Words or Writing, and accept my good Will, in rendring ſo ſudden and haſty an Anſwer to yours, &c.

I am

Yours, &c.

F I N I S.